

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

CONCERNED FRIENDS OF FERRY
COUNTY and DAVID L. ROBINSON,

Petitioners,

v.

FERRY COUNTY,

Respondent.

Case No. 97-1-0018c

**ORDER FINDING CONTINUING
NONCOMPLIANCE [Fish and Wildlife
Habitat Conservation Areas]**

I. SYNOPSIS

On December 20, 2013, the Board held a Compliance Hearing in Republic, Washington. The Board finds and concludes that Ferry County is in continuing non-compliance with the Growth Management Act requirement to include the Best Available Science in designating and protecting Fish and Wildlife Habitat Conservation Areas for Bull Trout and Common Loon under RCW 36.70A.170, RCW 36.70A.060(2), and RCW 36.70A.172. However, the County has adopted amended regulations that comply with the Growth Management Act to designate and protect habitat for Grizzly Bear, Pygmy Whitefish, Bald Eagle, Fisher, Peregrine Falcon, Canada Lynx, and Gray Wolf.

Between 1999 and 2014, the Board has issued 16 separate Orders Finding Continuing Non-Compliance with the GMA for Ferry County's failure to include Best Available Science in designating and protecting Critical Areas, and in particular, the County's failure to designate and protect Fish and Wildlife Habitat Conservation Areas.

II. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.¹ After the period for compliance

¹ RCW 36.70A.300(3)(b).

1 has expired, the Board is required to hold a hearing to determine whether the local
2 jurisdiction has achieved compliance.² For purposes of Board review of the comprehensive
3 plans and development regulations adopted by local governments in response to a non-
4 compliance finding, the presumption of validity applies and the burden is on the challenger
5 to establish that the new adoption is clearly erroneous in view of the entire record before the
6 board and in light of the goals and requirements of the GMA.³

7
8 In order to find the County's action clearly erroneous, the Board must be "left with the
9 firm and definite conviction that a mistake has been made."⁴

10 Within the framework of state goals and requirements, the Board must grant
11 deference to local governments in how they plan for growth:

12 In recognition of the broad range of discretion that may be exercised by
13 counties and cities in how they plan for growth, consistent with the
14 requirements and goals of this chapter, the legislature intends for the boards
15 to grant deference to the counties and cities in how they plan for growth,
16 consistent with the requirements and goals of this chapter. Local
17 comprehensive plans and development regulations require counties and
18 cities to balance priorities and options for action in full consideration of local
19 circumstances. The legislature finds that while this chapter requires local
20 planning to take place within a framework of state goals and requirements,
21 the ultimate burden and responsibility for planning, harmonizing the planning
22 goals of this chapter, and implementing a county's or city's future rests with
23 that community. RCW 36.70A.3201 (in part).

24 In sum, during compliance proceedings the burden remains on the Petitioner to
25 overcome the presumption of validity and demonstrate that any action taken by the County
26 is clearly erroneous in light of the goals and requirements of Chapter 36.70A RCW (the
27 Growth Management Act).⁵ Where not clearly erroneous and thus within the framework of
28 state goals and requirements, the planning choices of the local government must be granted
29 deference.
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32 ² RCW 36.70A.330(1) and (2).

³ RCW 36.70A.320(1), (2), and (3).

⁴ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

⁵ RCW 36.70A.320(2).

III. PROCEDURAL HISTORY

On August 29, 1997, a Petition for Review was filed in Case No. 97-1-0018 alleging *inter alia* non-compliance with the GMA relating to designating Critical Areas and protecting Fish and Wildlife Habitat Conservation Areas. On July 31, 1998, the Board issued a Final Decision and Order finding Ferry County in non-compliance.

On May 18, 2006, a Petition for Review was filed in Case No. 06-1-0003 also alleging *inter alia* non-compliance with the GMA relating to designating Critical Areas and protecting Fish and Wildlife Habitat Conservation Areas. On October 6, 2006, the Board issued a Final Decision and Order finding Ferry County in non-compliance.

Between 1999 and 2011, the Board issued 14 separate Orders Finding Continuing Non-Compliance with the GMA for Ferry County's failure to include Best Available Science in designating and protecting Critical Areas, and in particular, the County's failure to designate and protect Fish and Wildlife Habitat Conservation Areas.

Orders Finding Continuing Non-Compliance were issued on September 30, 1999, May 23, 2000, January 26, 2001, December 23, 2002, January 24, 2003, June 9, 2008 (two orders), February 13, 2009, March 17, 2009, February 23, 2010, March 3, 2010, September 10, 2010, April 4, 2011, and December 1, 2011.

During 2003, 2004, and 2005, the Superior Court, Court of Appeals, and Supreme Court respectively upheld and affirmed the Board's prior orders that Ferry County failed to include the Best Available Science in designating and protecting Fish and Wildlife Habitat Areas.⁶

On November 8, 2012, the Ferry County Superior Court entered an order as follows: "The part of the Board's order addressing the designation of habitats and species of local importance is reversed."⁷ That Superior Court Order is under appeal in the Court of Appeals. Accordingly, all issues relating to "the designation of habitats and species of local importance" will be held in abeyance until the Board receives instructions from the court,

⁶ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005).

⁷ Ferry County Superior Court Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment, attached to Declaration of Counsel Re: Substitution of Exhibit (November 9, 2012).

1 and the Board will not address "habitats and species of local importance" in this Compliance
2 Order.

3 On December 20, 2013, the Board held a Compliance Hearing in Republic,
4 Washington involving three coordinated cases: Case Nos. 97-1-0018, 01-1-0019, and 11-1-
5 0003. The hearing panel for deciding these three cases is comprised of Raymond L.
6 Paolella, Presiding Officer, and Board members Charles Mosher and Margaret Pageler.
7 Attending the Compliance Hearing were: attorney Tim Trohimovich, representing Concerned
8 Friends of Ferry County, David L. Robinson, and Futurewise; Deputy Prosecuting Attorney
9 L. Michael Golden, representing Respondent Ferry County; David L. Robinson; and Ferry
10 County Planning Director Irene Whipple.⁸

11 This Compliance Order decides the compliance issues presented in Case No. 97-1-
12 0018c relating to Fish and Wildlife Habitat Conservation Areas. Case No. 01-1-0019
13 (Agricultural Lands of Long Term Commercial Significance) will be decided in a separately
14 issued Compliance Order. Case No. 11-1-0013 (Mineral Resource Lands and Resource
15 Lands Policies) will be decided in a separately issued Compliance Order.
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18 IV. DISCUSSION

19 A. FISH AND WILDLIFE HABITAT CONSERVATION AREAS

20 1. Applicable Law

21 Each county shall designate where appropriate: "Critical areas." RCW 36.70A.170(1)(d).
22 The term "Critical areas" is defined as including the following areas and ecosystems:
23

- 24 (a) wetlands;
- 25 (b) areas with a critical recharging effect on aquifers used for potable water;
- 26 (c) fish and wildlife habitat conservation areas;
- 27 (d) frequently flooded areas; and
- 28 (e) geologically hazardous areas.⁹

29 Each county shall adopt development regulations that protect designated critical
30 areas. RCW 36.70A.060(2). The term "development regulations" is defined as:
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⁸ Also in attendance were planning commissioners, elected officials, and concerned citizens.

⁹ RCW 36.70A.030(5).

1 . . . the controls placed on development or land use activities by a county or
2 city, including, but not limited to, zoning ordinances, critical areas ordinances,
3 shoreline master programs, official controls, planned unit development
4 ordinances, subdivision ordinances, and binding site plan ordinances
5 together with any amendments thereto. A development regulation does not
6 include a decision to approve a project permit application, as defined in RCW
7 36.70B.020, even though the decision may be expressed in a resolution or
8 ordinance of the legislative body of the county or city.¹⁰

9 Development regulations shall be consistent with and implement the comprehensive plan.
10 RCW 36.70A.040(4)(d).¹¹

11 In designating and protecting critical areas, the GMA requires that “counties and
12 cities shall include the best available science (BAS) in developing policies and development
13 regulations to protect the functions and values of critical areas. In addition, counties and
14 cities shall give special consideration to conservation or protection measures necessary to
15 preserve or enhance anadromous fisheries.” RCW 36.70A.172(1).

16 Evidence of the best available science must be included in the record and must be
17 considered substantively in the development of critical areas policies and regulations.¹²
18 “Although BAS does not require the use of a particular methodology, at a minimum BAS
19 requires the use of a scientific methodology.”¹³ Although a county need not develop
20 scientific information through its own means, it must rely on scientific information and must
21 analyze that information using a reasoned process.¹⁴ Department of Commerce Guidelines
22 state that a county should address on the record “the relevant sources of best available
23 scientific information included in the decision-making.”¹⁵

24 If a county chooses to disagree with or ignore scientific recommendations and
25 resources provided by state agencies or Indian tribes, which a county could do, the county
26 must unilaterally develop and obtain valid scientific information.¹⁶ The GMA does not require
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30 ¹⁰ RCW 36.70A.030(7).

31 ¹¹ See also RCW 36.70A.060(3), RCW 36.70A.120; and RCW 36.70A.130(1)(d).

32 ¹² *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

¹³ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 837 (2005).

¹⁴ *Id.* at 836-837.

¹⁵ WAC 365-195-915(1)(b).

¹⁶ *Id.* at 836.

1 a county to follow BAS; rather it is required to "include" BAS in its record. A county may
2 depart from BAS if it provides a reasoned justification for such departure.¹⁷

3 RCW 36.70A.170(2) provides that in making critical areas designations, counties and
4 cities shall consider the guidelines established by the Department of Commerce pursuant to
5 RCW 36.70A.050(1). Under RCW 36.70A.050, these are "minimum guidelines" that apply to
6 all jurisdictions "to guide the classification" of critical areas. The Department of Commerce
7 "minimum guidelines" are codified in WAC Chapter 365-190.
8

9 WAC 365-190-030(6)(a) defines Fish and Wildlife Habitat Conservation Areas as
10 follows:

11 "Fish and wildlife habitat conservation areas" are areas that serve a critical
12 role in sustaining needed habitats and species for the functional integrity of
13 the ecosystem, and which, if altered, may reduce the likelihood that the
14 species will persist over the long term. These areas may include, but are not
15 limited to, rare or vulnerable ecological systems, communities, and habitat or
16 habitat elements including seasonal ranges, breeding habitat, winter range,
17 and movement corridors; and areas with high relative population density or
18 species richness. Counties and cities may also designate locally important
19 habitats and species.

20 WAC 365-190-130(1) states:

21 "Fish and wildlife habitat conservation" means land management for
22 maintaining populations of species in suitable habitats within their natural
23 geographic distribution so that the habitat available is sufficient to support
24 viable populations over the long term and isolated subpopulations are not
25 created. This does not mean maintaining all individuals of all species at all
26 times, but it does mean not degrading or reducing populations or habitats so
27 that they are no longer viable over the long term. Counties and cities should
28 engage in cooperative planning and coordination to help assure long term
29 population viability.

30 Fish and wildlife habitat conservation areas contribute to the state's
31 biodiversity and occur on both publicly and privately owned lands.
32 Designating these areas is an important part of land use planning for
appropriate development densities, urban growth area boundaries, open
space corridors, and incentive-based land conservation and stewardship
programs.

¹⁷ *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 430-431, 158 P.3d 1179 (2007).

1 Under WAC 365-190-130(2), Fish and Wildlife Habitat Conservation Areas that must
2 be considered for classification and designation include *inter alia*:

- 3 (a) Areas where endangered, threatened, and sensitive species have a
4 primary association;
5 (b) Habitats and species of local importance, as determined locally; . . .
6 (e) Naturally occurring ponds under twenty acres and their submerged
7 aquatic beds that provide fish or wildlife habitat;
8 (f) Waters of the state

9 When classifying and designating fish and wildlife habitat conservation areas,
10 counties must include best available science and should consider *inter alia*:

11 Evaluating land uses surrounding ponds and fish and wildlife habitat
12 conservation areas that may negatively impact these areas, or conversely,
13 that may contribute positively to their function, and

14 Establishing buffer zones around these areas to separate incompatible uses
15 from habitat areas.¹⁸

16 WAC 365-190-080(4) provides in pertinent part as follows:

17 Counties and cities should designate critical areas by using maps and
18 performance standards . . . However, because maps may be too inexact for
19 regulatory purposes, counties and cities should rely primarily on performance
20 standards to protect critical areas. Counties and cities should apply
21 performance standards to protect critical areas when a land use permit
22 decision is made.

23 The Department of Commerce Minimum Guidelines also state that counties and
24 cities should identify and classify seasonal ranges and habitat elements where federal and
25 state listed endangered, threatened and sensitive species have a primary association and
26 which, if altered, may reduce the likelihood that the species will persist over the long term.
27 Counties and cities should consult current information on priority habitats and species
28 identified by the Washington Department of Fish and Wildlife (WDFW).¹⁹ The goal of fish
29 and wildlife habitat conservation is to manage land so as to maintain species in suitable
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¹⁸ WAC 365-190-130(3).

¹⁹ WAC 365-190-130(4)(a).

1 habitats within their natural geographic distribution so that isolated subpopulations are not
2 created.²⁰

3 4 **2. Prior Compliance Order**

5 In the January 23, 2013, Compliance Order issued in Case No. 97-1-0018, the Board
6 found Ferry County in continuing non-compliance with the GMA relating to Critical Areas for
7 failing to include the Best Available Science (BAS) in designating and protecting Fish and
8 Wildlife Habitat Conservation Areas under RCW 36.70A.170, RCW 36.70A.060(2), and
9 RCW 36.70A.172.

10 11 **3. Recent Legislative Action by Ferry County**

12 On October 28, 2013, Ferry County passed Ordinance #2013-04 amending Ferry
13 County Resource Lands and Critical Areas Ordinance #2012-05, Sections 9.01, 9.02, 9.03,
14 and 9.04.²¹

15 16 17 **4. Board Analysis – Designation and Protection of Fish and Wildlife Habitat Areas**

18 The GMA requires counties to both **designate** and **protect** Fish and Wildlife Habitat
19 Conservation Areas (FWHC Areas).²² Designation is a fundamental first step that informs
20 County decision makers and the public on determining the location of FWHC Areas. The
21 GMA's mandate to protect FWHC Areas cannot be fulfilled unless people can figure out
22 where FWHC Areas are located.

23 When designating Fish and Wildlife Habitat Conservation Areas, Best Available
24 Science (BAS) must be included in the record. As explained by our Supreme Court, the
25 County must rely on scientific information and must analyze that information using a
26 reasoned process, i.e., a scientific methodology. *Ferry County v. Concerned Friends of*
27 *Ferry County*, 155 Wn. 2d. 824, 836-837 (2005).

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32 ²⁰ *Stevens County v. Futurewise*, 146 Wn. App. 493, 511, 192 P.3d 1 (2008), excerpting from former WAC
365-190-080(5).

²¹ Ferry County's Supplemental Index to Compliance Report, Exhibit 2 (November 22, 2013).

²² RCW 36.70A.170(1)(d); RCW 36.70A.060(2).

1 WAC 365-195-905(2) provides that counties and cities “may use information that
2 local, state or federal natural resource agencies have determined represents the best
3 available science.” WAC 365-190-130(4) states that counties and cities “should consult
4 current information on priority habitats and species identified by the Washington State
5 Department of Fish and Wildlife [WDFW].”
6

7 In the present case, Petitioners allege the County has failed to include Best Available
8 Science in designating and protecting Fish and Wildlife Habitat Conservation Areas. The
9 Board must examine the entire record in this case, including the actual scientific information
10 relied upon by the County, to determine if Petitioners have satisfied their burden to
11 demonstrate that the County failed to include Best Available Science as to FWHC Area
12 designations and policy development.

13 Under WAC 365-190-130(2), the County must classify and designate those areas
14 where Endangered, Threatened, and Sensitive (ETS) species have a primary association.
15 WAC 365-190-130(4)(a) states that counties should identify and classify seasonal ranges
16 and habitat elements where federal and state listed endangered, threatened, and sensitive
17 (ETS) species have a primary association and which, if altered, may reduce the likelihood
18 that the species will persist over the long term.
19

20 The Court of Appeals has held that the “GMA directs counties to determine what
21 lands are primarily associated with listed species, and then to adopt regulations protecting
22 those lands . . . the GMA requires [Stevens County] to designate and protect all critical
23 areas within its boundaries.”²³
24

25 The Washington State Department of Fish and Wildlife (WDFW) maintains a list of
26 Priority Habitats and Species (PHS), based on the Best Available Science, which identifies
27 those species known to occur in Ferry County, together with areas where habitat primarily
28 associated with the species exists.²⁴ “Priority Habitats” are those habitat types with unique
29 or significant value to many fish or wildlife species; “Priority Species” are those fish and
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32 ²³ *Stevens County v. Futurewise*, 146 Wn. App. 512 (2008); review denied, *Stevens County v. Futurewise*,
165 Wn.2d 1038 (2009).

²⁴ WDFW List of Species and Habitats Identified for Ferry County, attached as Tab 601 to Futurewise’s Motion
to Supplement the Record (Oct. 19, 2012) – <http://wdfw.wa.gov/conservation/phs/>.

1 wildlife species requiring special efforts to ensure their perpetuation because of their low
2 numbers, sensitivity to habitat alteration, tendency to form vulnerable aggregations, or
3 because they are of commercial, recreational, or tribal importance.²⁵

4 In response to the January 23, 2013, Compliance Order, Ferry County passed
5 Ordinance 2013-04 amending the Critical Areas Ordinance (CAO).
6

7 **Ordinance 2013-04, Section 9.01 Classification**

8 CAO Section 9.01(1)(a) was amended to classify two additional federally-listed ETS
9 species – Bull Trout (Threatened) and Steelhead (Threatened), both of which are known to
10 occur in Ferry County.
11

12 CAO Section 9.01(1)(b) was amended to classify three additional state-listed ETS
13 species: Pygmy Whitefish (sensitive), Grizzly Bear (endangered), and Canada Lynx
14 (threatened).
15

16 Petitioners question language in CAO Section 9.01(1)(c) relating to “proposed
17 alterations of areas of primary association” – this language was apparently adopted by Ferry
18 County several years ago. But the December 20, 2013, Compliance Hearing concerns
19 Petitioners’ challenge to Ordinance 2013-04, and Section 9.01(1)(c) was not amended by
20 Ordinance 2013-04. Therefore, the Board cannot consider Petitioners’ arguments on
21 Section 9.01(1)(c) at this time.
22

23 Petitioners state that Sections 901(1)(a) and 901(1)(b) have now designated as
24 Critical Areas additional ETS species and should be found in compliance for designating
25 those species.²⁶ The Board agrees and finds CAO Section 9.01 Classification complies with
26 the Growth Management Act.
27

28 **Ordinance 2013-04, Section 9.02 Designation**

29 CAO Section 9.02 contains a number of amendments that designate Fish and
30 Wildlife Habitat Conservation Areas for listed species.
31

32 ²⁵ *Management Recommendations for Washington’s Priority Species, Volume IV: Birds*; Larson, Azerrad, and Nordstrom, Technical Editors, Washington Department of Fish and Wildlife (May 2004) – Futurewise’s Motion to Supplement the Record, Tab 601 (Oct. 19, 2012).

²⁶ Concerned Friends of Ferry County’s, David L. Robinson’s, and Futurewise’s Concurrence in and Objections to a Finding of Compliance [Fish and Wildlife Habitat Conservation Areas], p. 3 (Nov. 26, 2013).

1 Bull Trout: CAO Section 9.02(3) states that the Bull Trout's "areas of primary
2 association are outside of Ferry County and so no lands are designated as an FWHCA for
3 Bull Trout."²⁷ In Ferry County's response brief, the County claims:

4 Bull Trout have no areas of primary association in Ferry County. This was
5 again confirmed by Fish and Wildlife in its August 14, 2012, letter, which
6 indicates that **Ferry County is not part of the designated Bull Trout**
7 **recovery area**. This is because, as previously submitted, Bull Trout have no
8 areas of primary association in Ferry County. There is thus a scientific basis
9 for the County's decision not to set aside habitat here.²⁸

10 Contrary to the County's claim, the cited August 14, 2012, WDFW letter actually says
11 the opposite – "Ferry County is part of the designated Bull Trout Recovery Area."²⁹

12 Bull Trout is listed under the federal Endangered Species Act as a "Threatened
13 Species." A February 15, 2013, letter from the U. S. Fish and Wildlife Service states that
14 although the Bull Trout itself may occur in Ferry County, there is no federally-designated
15 "critical habitat" for the species in Ferry County.³⁰ The term "critical habitat" is a term of art
16 under the federal Endangered Species Act, and federal critical habitat designations affect
17 only federal agency actions or federally funded or permitted activities.³¹ The federal
18 Endangered Species Act has different standards for designating habitat as compared to the
19 standards under the State Growth Management Act.³² Thus, the absence of **federally-**
20 **designated critical habitat** is not a determinative fact for purposes of a **county's** GMA
21 designation of areas where ETS species have a "primary association."
22

23 The U. S. Fish and Wildlife Service letter also included an attachment referring to
24 "major concerns that should be addressed" in assessing impacts on Bull Trout from
25 proposed projects in Ferry County. Most Bull Trout are migratory, and the decline of Bull
26
27

28 ²⁷ Ferry County Ordinance 2013-04, p. 43 (Oct. 28, 2013).

29 ²⁸ Ferry County's Response to Petitioners' and Intervenor's Concurrence and Objections, p. 3 (Dec. 10, 2013, emphasis added).

30 ²⁹ Letter dated August 14, 2012, from WDFW Biologist Karin A. Divens to Ferry County Planning Director Irene Whipple, p. 1, attached as Exhibit 604 to Futurewise's Concurrence in and Objections to a Finding of Compliance (Nov. 25, 2013).

31 ³⁰ Ferry County's Supplemental Index to Compliance Report, Ex. 17 (Jan. 8, 2013).

32 ³¹ 16 U.S. Code §§ 1532-1533, officially noticed under WAC 242-03-630(1).

³² Compare ESA, 16 U.S. Code § 1532 ("essential to the conservation of the species") with GMA, WAC 365-190-130 ("species have a primary association").

1 Trout is primarily due to habitat degradation and fragmentation, blockage of migratory
2 corridors, poor water quality, past fisheries management practices, impoundments, dams,
3 water diversions, and the introduction of nonnative species.³³

4 The Board finds substantial evidence in the record demonstrating that Bull Trout is
5 present in Ferry County and Bull Trout has a primary association with certain areas of Ferry
6 County. The Washington State Department of Fish and Wildlife, Priority Habitat and Species
7 List indicates that Bull Trout is known to occur in Ferry County where there is habitat
8 primarily associated with Bull Trout. For example, the record indicates there is Bull Trout
9 habitat associated with the Kettle and Columbia Rivers, where they flow through Ferry
10 County.³⁴

11
12 The Washington State Supreme Court has held that Ferry County must designate
13 and protect Endangered, Threatened, and Sensitive species and their habitats.³⁵ The
14 Supreme Court noted:

15
16 The fact that the county's listing omits both the peregrine falcon and the **bull**
17 **trout**, both of which are ETS species known to be present in Ferry County,
18 further supports that the listing was not generated using BAS.³⁶

19 Ferry County CAO Section 9.02(3) omits Bull Trout and fails to designate any Bull
20 Trout Habitat Conservation Areas. The Board is left with the firm and definite conviction that
21 a mistake has been made in failing to designate any Bull Trout Habitat Conservation Areas
22 in accordance with the Best Available Science in the record. Ferry County's failure to
23 designate any Bull Trout habitat is not supported by substantial evidence in the record and
24 represents a departure from the Best Available Science without any reasoned justification.
25 The Board finds and concludes that Ferry County violated RCW 36.70A.060(2), RCW
26 36.70A.170, 36.70A.172, and WAC 365-190-130. Ferry County has also not complied with
27 the Supreme Court's 2005 decision.
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30 ³³ 75 Fed. Reg. 63898 (Oct. 18, 2010), amending 50 C.F.R. § 17.95(e) "Bull Trout (*Salvelinus confluentus*);"
31 Ferry County's Supplemental Index to Compliance Report, Ex. 17 (January 8, 2013).

32 ³⁴ Concerned Friends of Ferry County's, David L. Robinson's, and Futurewise's Concurrence in and
Objections to a Finding of Compliance [Fish and Wildlife Habitat Conservation Areas], Ex. 23 (November 26,
2013) – *WDFW Priority Habitats and Species Identified for Ferry County*.

³⁵ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 838–39, 123 P.3d 102, 109 (2005).

³⁶ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 837 (2005) [emphasis added].

1 Bald Eagle: According to the WDFW Biologist:

2 The priority area for bald eagles is the nesting site or **Breeding Area**, the
3 area necessary to support reproduction and the rearing of young; includes
4 breeding sites and adjacent foraging habitat, and may include a disturbance
5 buffer. Another important Priority Area for bald eagles are **Communal**
6 **Roosts**: Habitat features (e.g. trees) that are regularly or traditionally used by
 eagles for resting, territory display, or foraging.³⁷

7 Ferry County passed Ordinance 2013-04, amending CAO Section 9.02(8) to designate as a
8 Fish and Wildlife Conservation Area those places within 660 feet of an active breeding site
9 or a communal roost. Petitioners allege that Ordinance 2013-04 does not designate enough
10 Bald Eagle habitat. However, the Board notes that the County has now designated areas
11 within 660 feet of the priority areas recommended by WDFW, i.e., breeding sites and
12 communal roosts. Petitioners have failed to come forward with evidence to show that the
13 County failed to include Best Available Science in designating Bald Eagle habitat.

14 Peregrine Falcon: This falcon species has made a recovery in Washington State
15 since the use of DDT was banned and has gone from an Endangered status to Sensitive.
16 This priority species is considered particularly vulnerable during nesting season March –
17 June. Peregrines have specific habitat requirements for nesting. Peregrine falcons usually
18 nest on cliffs, typically 45 m (150 ft.) or more in height. They will also nest on off-shore
19 islands and ledges on vegetated slopes. Eggs are laid and young are reared in small caves
20 or on ledges. Nest sites are generally near water. The birds are sensitive to disturbance
21 during all phases of the nesting season (1 March through 30 June). WDFW recommended
22 that Ferry County designate cliff habitats as the primary habitat area of association for this
23 species thereby helping to ensure that land use activities do not inadvertently result in
24 impacts to nesting habitats.³⁸

25 Ferry County passed Ordinance 2013-04, amending CAO Section 9.02(9) to
26 designate as a Fish and Wildlife Habitat Conservation Area cliffs of 150 feet or more in
27 height and active Peregrine Falcon nest sites, which roughly corresponds to the WDFW
28 29 30 31

32 ³⁷ Letter dated August 14, 2012, from WDFW Biologist Karin A. Divens to Ferry County Planning Director Irene Whipple, p. 4, attached as Ex. 604 to Futurewise's Concurrence in and Objections to a Finding of Compliance (Nov. 25, 2013) [emphasis added].

³⁸ *Id.* at p. 5.

1 recommendation. Petitioners allege that Ordinance 2013-04 does not designate enough
2 Peregrine Falcon habitat but Petitioners have failed to come forward with evidence to show
3 that the County failed to include Best Available Science in designating Peregrine Falcon
4 habitat.

5 Fisher: Ferry County passed Ordinance 2013-04, amending CAO Section 9.02(6) to
6 designate as a Fish and Wildlife Habitat Conservation Area all lands within federal and state
7 forest lands, state natural preserves, the Grizzly Mountain Wilderness, and forest lands
8 within the Hellgate Game Reserve. Petitioners claim that the County is required to also
9 designate private forest lands, not just public forest lands. The Board notes the Commerce
10 guidelines at WAC 365-190-130(1) point out that “fish and wildlife habitat conservation
11 areas . . . occur on both publicly and privately owned lands.” But Petitioners have not
12 identified scientific information supporting the designation of particular private forest lands
13 within Ferry County necessary to provide Fisher habitat.³⁹

14
15
16 According to the Washington State Recovery Plan for the Fisher, re-establishment
17 will rely primarily on publicly-owned lands to provide fisher habitat at the large spatial scale
18 needed for a wide-ranging carnivore:

19 Federal and state ownerships provide the greatest quantity and quality of
20 fisher habitat likely to support viable fisher populations in Washington . . . the
21 Selkirk Recovery Area is composed primarily of the Colville and Idaho
22 Panhandle national forests . . . Mature and old-growth cedar/hemlock forests
23 and forested riparian types in the southern Selkirk Mountains could provide
24 suitable habitat for fishers in northeastern Washington . . .⁴⁰

25 Petitioners have failed to come forward with evidence to show that the County failed to
26 include Best Available Science in designating Fisher habitat.

27 Gray Wolf: Ferry County passed Ordinance 2013-04, amending CAO Section
28 9.02(10) to designate active Gray Wolf den sites during the breeding season as Fish and
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32 ³⁹ If designation of certain lands is necessary to prevent habitat fragmentation or provide movement corridors,
for example, the burden is on the challenger to identify the science applicable to this species and these lands.

⁴⁰ Hayes, G. E., and J. C. Lewis. 2006. *Washington State Recovery Plan for the Fisher*. Washington
Department of Fish and Wildlife, Olympia, p. 36 – referenced in Ferry County Ordinance 2013-04 and officially
noticed under WAC 242-03-630(2).

1 Wildlife Habitat Conservation Areas, in accordance with WDFW's recommendation.⁴¹

2 Petitioners do not challenge this Gray Wolf habitat designation, and the Board therefore
3 deems the Gray Wolf habitat designation to be GMA-compliant.

4 Common Loon. Common Loon is a state-listed *Sensitive* species and is present in
5 Ferry County.⁴² Common Loons breed on large lakes in forested areas, and nests are
6 situated on shorelines, islands, or floating structures within 1.5 meters (5 feet) of shore;
7 Common Loons are very susceptible to nest disturbance and are intolerant of recurrent
8 disturbance within 150 meters (492 feet) of nest sites.⁴³ Ferry County passed Ordinance
9 2013-04, amending CAO Section 9.02(5) to designate active Loon breeding sites and
10 nursery pools as Fish and Wildlife Habitat Conservation Areas, including those sites at Long
11 Lake, Ferry Lake, Round Lake, Swan Lake, and Twin Lakes. Petitioners do not challenge
12 the designations of Loon habitat in CAO Section 9.02(5).
13
14

15 **Ordinance 2012-05, Section 9.03 Protection Requirements**

16 As to the Common Loon, CAO Section 9.03(10.2) states: "Regulations to protect the
17 Common Loon FWHCA includes all regulations applicable to the use of the waterbody,
18 shoreline regulations, and buffers as provided in this section."⁴⁴ WDFW's scientific
19 management recommendations include:
20

- 21 • Protect known nest and nursery sites.
- 22 • Restrict disturbance of nest sites from 1 April to 15 July and brood-rearing nursery
23 pools from 15 July to 1 September. Maintain a 150 m (492 ft.) disturbance buffer
24 around brood-rearing areas (nursery pools) from 15 July to 1 September.
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28 ⁴¹ Letter dated August 14, 2012, from WDFW Biologist Karin A. Divens to Ferry County Planning Director Irene
29 Whipple, p. 5, attached as Ex. 604 to Futurewise's Concurrence in and Objections to a Finding of Compliance
30 (Nov. 25, 2013).

31 ⁴² Concerned Friends of Ferry County's, David L. Robinson's, and Futurewise's Concurrence in and
32 Objections to a Finding of Compliance [Fish and Wildlife Habitat Conservation Areas], Ex. 23 (Nov. 26, 2013)
– *WDFW Priority Habitats and Species Identified for Ferry County*.

⁴³ *Management Recommendations for Washington's Priority Species, Volume IV: Birds*; Larsen, Azerrad, and
Nordstrom, Technical Editors, Washington Department of Fish and Wildlife, pp. 1-4 (May 2004) – Futurewise's
Motion to Supplement the Record, Tab 601 (Oct. 19, 2012).

⁴⁴ Ferry County Critical Areas Ordinance No. 2013-04, Section 9.02 Designation, p. 49 (Oct. 28, 2013).

- Erect no structures within 150 m (492 ft.) of nesting sites. Avoid building within this distance year round to maintain a permanent buffer around nests.⁴⁵

Ferry County acknowledges that these Common Loon management recommendations are part of the BAS record.⁴⁶ The County has amended CAO Section 9.02(5) to prohibit new structures within 500 feet of Loon breeding sites and nursery pools. But the County has not acted to (1) “restrict disturbance of nest sites from 1 April to 15 July and brood-rearing nursery pools from 15 July to 1 September,” and (2) “maintain a 150 m (492 ft.) disturbance buffer around brood-rearing areas (nursery pools) from 15 July to 1 September” as recommended by the Best Available Science. Thus, Ferry County has departed from or ignored the scientific recommendation by WDFW to protect Common Loon habitats, without any reasoned justification. The Board is left with the firm and definite conviction that a mistake has been made in failing to consider these scientific recommendations to protect designated Common Loon habitat.

Petitioners also challenge CAO Section 9.03(2)(17) allowing within Critical Areas buffers “Existing mining and on-going mining and other natural resource activities.” However, Petitioners have failed to satisfy their burden to come forward with scientific evidence in the record showing how **existing** mining and natural resource activities, as distinct from **future** proposed activities, will harm the ecological functions and values of these ecosystems.

Ordinance 2013-04, Section 9.04 Mapped Habitat Areas and Mapped Species

Observations Review

The Growth Management Act requires counties to include the Best Available Science in developing policies and development regulations to protect the functions and values of Fish and Wildlife Habitat Conservation Areas.

⁴⁵ *Management Recommendations for Washington’s Priority Species, Volume IV: Birds*; Larson, Azerrad, and Nordstrom, Technical Editors, Washington Department of Fish and Wildlife, pp. 1-4 (May 2004) -- Futurewise’s Motion to Supplement the Record, Tab 601 (Oct. 19, 2012).

⁴⁶ Findings of Fact and Conclusions of the Ferry County Board of Commissioners Regarding Adoption of Amendments to the Comprehensive Plan and Development Regulations, FOF 7, p. 3 (Oct. 28, 2013).

1 In the January 23, 2013 Order Finding Continuing Noncompliance, the Board found
2 former CAO Section 9.04(2) provided a review process for proposed projects located within
3 1,000 feet of a documented point location for an ETS species but not within a specified
4 distance from a polygon. BAS indicates that:

5 Sites identified as priority habitats or locations where a priority species is
6 known to occur often are represented on a map as a point or a polygon.
7 Although the exact mapped locations are undoubtedly important, the area
8 surrounding these locations may also need to be evaluated to determine
9 what land uses are compatible or incompatible with the requirements of
10 species using an area.⁴⁷

11 Science in the record clearly recommended project review both for areas adjacent to habitat
12 polygons and for areas adjacent to habitat points.

13 On October 28, 2013, Ferry County passed Ordinance 2013-04, amending CAO
14 Section 9.04 to require development review within 200 feet of a polygon. Petitioner now
15 argues Section 9.04 fails to require review of developments near line habitats in violation of
16 the GMA. However, the Board notes that linear-shaped areas cannot be viewed using only
17 an abstract, mathematical concept of "lines." While rivers and streams typically have a linear
18 or curvilinear shape, these water courses also have a width. Thus, watercourses occupy a
19 two dimensional area or polygon across the landscape, with multiple sides. Linear or
20 curvilinear watercourses have both length and width, which means that the County's Critical
21 Areas Ordinance requires development review for all proposed actions within 200 feet of the
22 river or stream polygon.
23
24

25 Petitioners expressed concern about language in CAO Section 9.04(1) stating that
26 mapped polygon areas already include the appropriate buffer for the particular species.
27 While this language may be confusing and should perhaps be clarified, Petitioners provided
28 no scientific evidence in the record showing that Ferry County's mapped polygons fail to
29 adequately protect habitat, as required by the GMA.
30

31 Petitioners also expressed concern about protecting Lynx habitat in Ferry County.
32 Petitioners cite a Stevens County court decision which held (1) Best Available Science

⁴⁷ Futurewise's Motion to Supplement the Record, Tab 615 (Oct. 19, 2012), Washington Department of Fish and Wildlife, *Priority Habitat and Species List*, p. 3 (Olympia, Washington: 2008).

1 establishes that Lynx polygon buffers are necessary, and (2) the failure of Stevens County
2 to use BAS to adopt scientifically defensible buffers adjacent to Lynx polygons violated the
3 GMA.⁴⁸

4 With regard to protection of Lynx, a federally-designated Threatened Species, the
5 record contains scientific information and recommendations on protecting the habitat
6 functions and values. The Washington State Recovery Plan for the Lynx states in part as
7 follows:
8

9 *Forest roads and recreation.* The introduction of a road system in previously
10 undisturbed landscapes has direct and indirect effects on lynx. Although road
11 edges may provide foraging opportunities, roads eliminate some lynx habitat
12 (6 ac per mile) while increasing recreational access to remote areas. Lynx
13 may become more vulnerable to disturbance and illegal and incidental
14 hunting and trapping mortalities. The impact of recreational activities on lynx
15 has received little study. The amount of recreational development and activity
16 in higher elevations has been increasing rapidly in recent years. It is
17 speculated that compacted snow on roads and trails increases the use of
18 high elevations by coyotes and bobcats (see Competition..., p. 31). Even if
19 facilitating competition is not a factor, high intensities of winter recreation are
likely to affect lynx habitat use. Impacts may depend on the quality of lynx
habitat, season, time of day, and the type, frequency, and pattern of activity
(Ruediger, et al. 2000).⁴⁹

20 In addition, there is science in the record stating that “[a]ny substantial increase in human
21 activities in remote areas is likely to have adverse effects on rare forest carnivores”
22 including the Lynx,⁵⁰ and scientific recommendations to protect Lynx denning sites from the
23 adverse effects of winter recreation activities and human disturbance.⁵¹ To protect Lynx
24

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26 ⁴⁸Memorandum Decision on Appeal from Growth Management Hearings Board, Stevens County Superior
27 Court Judge Rebecca (April 5, 2011) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011). See also,
28 IR 502 - *Washington State Recovery Plan for the Lynx*, Washington State Department of Fish and Wildlife
(Stinson, D.W. 2001).

29 ⁴⁹ Futurewise’s Motion to Supplement the Record, Tab 602 (Oct. 19, 2012), Stinson, D. W., *Washington State
Recovery Plan for the Lynx*, p. 30 (Washington Department of Fish and Wildlife, Olympia, Washington: 2001).

30 ⁵⁰ Futurewise’s Motion to Supplement the Record, Tab 619 (Oct. 19, 2012), Bull, et al., *Effects of Disturbance
on Forest Carnivores of Conservation Concern in Eastern Oregon and Washington* 75 NORTHWEST SCIENCE
31 180, 182 (Special issue 2001).

32 ⁵¹ Futurewise’s Motion to Supplement the Record, Tab 620 (Oct. 19, 2012), Michael J. Wisdom, Richard S.
Holthausen, Barbara C. Wales, Christina D. Hargis, Victoria A. Saab, Danny C. Lee, Wendel J. Hann, Terrell
D. Rich, Mary M. Rowland, Wally J. Murphy, and Michelle R. Eames; *Source Habitats for Terrestrial
Vertebrates of Focus in the Interior Columbia Basin: Broad-Scale Trends and Management Implications:
Volume 2—Group Level Results*; p. 246 in Thomas M. Quigley, Editor, *Interior Columbia Basin Ecosystem*

1 habitat, WDFW recommended that Ferry County adopt a 200 foot wide trigger distance
2 around the Lynx habitats polygons.⁵² Ordinance 2013-04 has adopted the WDFW
3 recommendation to protect Lynx habitat polygons by requiring development review in areas
4 within 200 feet of the Lynx polygons.

5 Petitioners have failed to carry their burden of proof to show that CAO Section 9.04,
6 as amended by Ordinance 2013-04, does not provide adequate protection to Fish and
7 Wildlife Habitat lines and polygons.⁵³
8

9 10 **V. BOARD FINDINGS OF FACT**

11 Based on Best Available Science in the record, the Growth Management Hearings
12 Board makes the following Findings of Fact:

13 1. In passing Ordinance 2013-04, Ferry County adopted amended regulations to
14 designate and protect fish and wildlife habitat conservation areas for Grizzly Bear,
15 Pygmy Whitefish, and Gray Wolf. These provisions are unchallenged and are
16 supported by Best Available Science.

17 2. Petitioners failed to carry their burden of proof to show that Ordinance 2013-04
18 fails to designate and protect fish and wildlife habitat conservation areas for Bald
19 Eagle, Peregrine Falcon and Canada Lynx.

20 3. Bull Trout is known to occur in Ferry County and has a primary association with
21 certain areas of Ferry County.

22 4. Ferry County CAO Section 9.02(3) omits Bull Trout and fails to designate any Bull
23 Trout Habitat Conservation Areas.

24 5. Most Bull Trout are migratory, and the decline of Bull Trout is primarily due to
25 habitat degradation and fragmentation, blockage of migratory corridors, poor water
26 quality, past fisheries management practices, impoundments, dams, water
27 diversions, and the introduction of nonnative species.

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29
30 *Management Project: Scientific Assessment* (U.S. Department of Agriculture, Forest Service, Pacific
31 Northwest Research Station, Portland, Oregon: General Technical Report PNW-GTR-485 May 2000).

32 ⁵² Futurewise's Motion to Supplement the Record, Tab 616 (Oct. 19, 2012); Ferry County's Post-Hearing
Supplemental Brief Appendix 19 (Oct. 25, 2011); April 14, 2010 Discussion with Karin Divens at the Planning
Commission Regular Meeting, p. 16.

⁵³ The Board does not address the "designation of habitats and species of local importance" at this time since
that is currently being litigated in the courts and is being held in abeyance pending court instructions.

1 6. Bull Trout is listed under the federal Endangered Species Act as a "Threatened
2 Species."

3 7. The Board is left with the firm and definite conviction that a mistake has been
4 made in failing to designate and protect Bull Trout habitat as a Fish and Wildlife
5 Habitat Conservation Area.

6 8. Ferry County's failure to designate any Bull Trout habitat is not supported by
7 substantial evidence in the record.

8 9. Common Loon is known to occur in Ferry County and has a primary association
9 with certain areas of Ferry County.

10 10. Best Available Science in the record recommends protecting Common Loon
11 habitat by restricting the disturbance of nest sites from 1 April to 15 July and brood-
12 rearing nursery pools from 15 July to 1 September.

13 11. Best Available Science in the record recommends protecting Common Loon
14 habitat by maintaining a 150 m (492 ft.) disturbance buffer around brood-rearing
15 areas (nursery pools) from 15 July to 1 September.

16 12. The County has not acted to restrict disturbance of Common Loon nest sites from
17 1 April to 15 July and brood-rearing nursery pools from 15 July to 1 September, and
18 to maintain a 150 m (492 ft.) disturbance buffer around brood-rearing areas (nursery
19 pools) from 15 July to 1 September.

20 13. The Board is left with the firm and definite conviction that a mistake has been
21 made in failing to consider scientific recommendations to protect designated
22 Common Loon habitat.

23
24 **VI. BOARD CONCLUSIONS OF LAW**

25 1. In adopting Ordinance 2013-04, Ferry County has complied with the GMA as set forth
26 in prior Board orders with respect to designation and protection of fish and wildlife
27 habitat conservation areas, except for provisions for Bull Trout and Common Loon
28 habitats.

29 2. Ferry County's failure to designate any Bull Trout habitat represents a departure from
30 the Best Available Science without any reasoned justification.

31 3. Ferry County has departed from or ignored the scientific recommendation by WDFW
32 to protect designated Common Loon habitats, without any reasoned justification.

1 4. Critical Areas Ordinance 2013-04 (relating to Bull Trout and Common Loon habitats)
2 is clearly erroneous in view of the entire record before the Board and in light of the goals
3 and requirements of the Growth Management Act.

4 5. Ferry County violated RCW 36.70A.060(2), RCW 36.70A.170, 36.70A.172, and WAC
5 365-190-130.

6 6. Ferry County is in compliance with the requirements of the Growth Management Act
7 to include Best Available Science in protecting habitat points, lines, and polygons by
8 using a review process for proposed projects located within a specified distance from
9 habitat areas.

10 VI. ORDER

11 Ferry County is in continuing non-compliance with the Growth Management Act
12 requirement to include the Best Available Science in designating and protecting Fish and
13 Wildlife Habitat Conservation Areas for Bull Trout and Common Loon under RCW
14 36.70A.170, RCW 36.70A.060(2), and RCW 36.70A.172, and
15

16 Ferry County is ordered to bring its Comprehensive Plan and Development
17 Regulations into compliance with the Growth Management Act according to the following
18 schedule:
19

Item	Date Due
Compliance Due	June 6, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	June 20, 2014
Objections to a Finding of Compliance	July 7, 2014
Response to Objections	July 21, 2014
Compliance Hearing – Telephonic Call 1800 704-9804 and use pin 5721566#	August 6, 2014 10:00 a.m.

1 Entered this 5th day of February, 2014.

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4

Raymond L. Paolella, Board Member

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Charles Mosher, Board Member

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Margaret Pageler, Board Member

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12 **Note: This is a final decision and order of the Growth Management Hearings Board**
13 **issued pursuant to RCW 36.70A.300.⁵⁴**
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⁵⁴ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on
31 all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
32 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty
days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth
Management Hearings Board is not authorized to provide legal advice.